ARGUMENT,

IN THE CASE

RHODE-ISLAND AGAINST MASSACHUSETTS.

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PROVIDENCE:
KNOWLES, VOSE & COMPANY.
MDCCCXXXVIII.

Supreme Court of the United States.

JANUARY TERM, 1838.

The State of Massachusetts, *ads.* The State of Rhode-Island. } Motion by Defendant to dismiss Complainant's Bill in Equity, for want of Jurisdiction.

Mr. Hazard on the part of the Complainant.

I should be wanting in duty to the State which has appointed me one of her Counsel, if I did not ask leave to take some notice of the very free animadversions bestowed upon her conduct, and that of her Counsel, by the opening Counsel on the other side, before introducing his present motion.

The statements which the Counsel indulged himself in making had no connexion with the motion he was about to make; and were the more out of place and ill-timed, as the motion is designed to prevent any inquiry into the correctness of those statements, or into any part of the cause or proceedings.

I am sure that the Counsel did not count upon producing any effect here by such extraneous remarks as he made. They are better calculated to gratify the innocent self-complacency of the good people of the Commonwealth.

Rhode-Island was charged by the Counsel with bringing a Bill before this Court, containing high charges against the State of Massachusetts, and then shrinking from the trial of those charges; and studying to produce delays through every stage of the proceedings. Massachusetts had promptly ap-

peared and put in her answer; and had been very desirous to bring the cause to a termination; and in all her proceedings had shown great liberality to the Complainant State and her Counsel. But it had required coercion to bring Rhode-Island to proceed and reply; and when she did reply, she at the same time filed a notice that at the opening of the Court she should move to withdraw that replication.

Sir, let me assure the Counsel that the State of Rhode-Island did not bring her complaints before this tribunal without being quite in earnest in her desire to have them investigated: and fully prepared and able, as she believed, to substantiate them. She knew, from experience, that her antagonist was not only powerful, but was conscious of her power; and disposed to exercise it with a strong arm; and it was for that reason that she summoned her here, where that power and importance must not be shown; and are not to be feared. And had the Defendant State taken the ordinary and only approved course in such cases in Equity, and put in a full and general answer to the merits of the whole Bill, there could have been no delay; and the cause might have been finally disposed of at the very next term of the Court. It was by incongruous special pleading, not favorable to the furtherance of justice, that delay and difficulties have been created. The Defendant did not think proper to meet the Complainant upon the merits of the cause; and, to avoid this, put in a special plea

in bar: not what is called a pure plea in bar, grounded on new matter in bar; but what the writers upon Equity pleading call an anomalous and incongruous one; not entitled to be called a plea: one which the Courts of Equity do not countenance, though they permit, because they consider it as an attempt to evade the merits and justice of the cause. We do not deny that Massachusetts could take this course, under the irregular practice which, it is said, has crept imperceptibly into the Chancery Courts. But, when she did put in such a plea, the Complainant had a right, either to amend her Bill, with leave of the Court, or to file exceptions to the sufficiency of the plea. And one of these courses she would certainly have adopted: for a general replication to such a plea was not to be thought of; since it would admit the sufficiency of the plea, if true, however defective and bad it might be; and the truth of the matter of the plea could not be denied, as it was all copied from the Bill itself. Such a course therefore would be a palpable sacrifice of the whole cause; which it cannot be imagined any complainant would voluntarily bring upon himself.

But, sometime previous to the commencement of this Court in 1836, the Counsel of Massachusetts and the Attorney General of Rhode-Island, came to an express understanding, that no proceedings in the case would be had at that term; and that it could be fully prepared, on both sides, during the vacation, for trial at the next succeeding term of

the Court. And the Counsel of Rhode-Island was then assured that he need not attend the Court that winter, and in consequence of this arrangement and assurance he did not attend.

But, in the course of the term, it occurred to the Counsel for Massachusetts that something was necessary to be done for the purpose of putting the case in a situation to be carried by that term; and it was for this sole purpose, and surely, after the arrangement which had just been made with the Complainant's (then absent) Counsel, with no intention of taking any undue advantage of the Complainant, or affecting her rights, that the order alluded to was applied for. And it was upon this explicit assurance and explanation, given by the Counsel of Massachusetts, that, in the absence of the Counsel of Rhode-Island, one of her Senators, who was not of counsel in the case, and so expressly informed the Counsel of Massachusetts at the time, assented to the order. I state these facts, sir, explicitly upon the authority of the Attorney General of Rhode-Island, and that of the Senator, who is now in Court and gives me his assent to them, as far as he is referred to. I expect to hear no denial of them: they cannot and must not be denied.

The Attorney General of Rhode-Island, of course, complied with the order of the Court, and at the same time, as was proper, filed the notice that has been alluded to. But he never permitted himself to believe for a moment, and does not now, that,

after the arrangement made with him by the Counsel of Massachusetts, and the express assurance given by the same Counsel to the Senator, who, in consequence of that assurance, had assented to the order, any attempt would be made to cut off the rights of the Complainant in Equity by means of that order. And in this confidence in the fair intention of the Counsel of Massachusetts, we were comfirmed by the written agreement entered into by the Attornies General of both States, at the last term, after the case had been continued; providing for amendments by either party; and for a change of pleading by the Defendant, at any time before the hearing of the cause.

But the Counsel now give us notice, even here before this Court, that they do not mean to keep that agreement: and that they do now rescind it. Truly this causeth us to wonder. But we have an idea that one party to a valid mutual agreement cannot so easily rescind it without the consent of the other. The agreement itself was a fair and reasonable one; reciprocal and equally to the advantage of each party. I'm sure, sir, I cannot inform you, why Massachusetts should now be so desirous to break her agreement.

As long back as October last, I gave written notice to the Attorney General of Massachusetts that we should ask to amend the Bill, by annexing to it copies of two reports made to the Legislature of Massachusetts by Committees appointed by that Legislature; one in 1750, the other in 1792. These

reports are of course well known to and in the possession of the Counsel of Massachusetts; and the annexation of these to the Bill, in which they are already mentioned but not recited at length, need not be the cause of the least delay.

We think it proper that these proceedings should be put into the case in order that the Court should he possessed of the whole merit of it. They contain, we think, matter in avoidance of the bar matter of the plea, drawn from the limited recitals in the Bill, of *previous* proceedings. Surely the Counsel for Massachusetts do not desire to avail themselves of the partial recital of proceedings in the Bill, and to keep out of sight all further matter and subsequent proceedings of their own State and within their own knowledge; which shows that their plea in bar does not tell the whole story nor the whole truth. This Court will suffer no such injustice to be practised here. Courts of Equity will possess themselves, as far as possible, of the whole merits of the case. And as a Complainant cannot, in Chancery, reply specially any new matter he may have, he is always permitted and encouraged to add such new matter to his Bill; that being the only way in which he can avail himself of it. We should have made our motion to amend at the commencement of this term; but did not wish to do so in the absence of the Attorney General of Massachusetts: and on his arrival here, we had notice of the present notice to dismiss; with which we did not think it useful to interfere. We are

prepared to make that motion, and (with permission of the Court) shall make it the first moment after this motion is disposed of; if overruled, as we trust it will be.

We are told by the Attorney General that we ought to be grateful to Massachusetts for the liberality of her conduct towards us in this case; but we cannot see that liberality in her refusal to meet us fairly upon the merits of the cause—we cannot see it in the avowal of her intention to disregard her written agreement with us; and thereby to leave herself free to hold on to undue advantages taken by her in the progress of the case; and, least of all, can we acknowledge her liberality in the attempt she is now making to throw us out of court, and to deprive us of a hearing and of our only remedy; that she may remain sole arbiter of her own cause.

I am glad, sir, to come to the motion before the Court. The merits of this motion might have been more satisfactorily examined and discussed by us, if we could have had the motion, and the specific grounds of it, put into writing, as we were desirous and requested that they should be—but without effect.

It does appear to me, that a motion which goes to cut off one of the most important branches of the jurisdiction of the Supreme Court; exercised by it from its first establishment; and to deprive a party in Court of the benefit of that jurisdiction, and her only remedy for aggravated injuries, (as she has a right to insist in resisting a motion which

would deprive her of a hearing,) that such a motion and the specific grounds of it, ought to be presented in writing, with precision and fullness, and with adequate notice of them to the opposite party, to enable her to meet them, and to know what she has to meet. But we are now to answer this motion, verbally made, and to seek for the grounds of it, as they are scattered through a long and desultory opening argument, of more than two days continuance; in the course of which, those grounds have taken so many different shapes, that it is not easy to recognize them for the same, or reconcile them one to another. This being the case, it is no longer surprising that the Counsel for Massachusetts refused to put the specific grounds of their motion into writing.

I have, however, endeavored to make myself acquainted with the real question to be decided by the Court, and, with permission, will now present such views as I have been able to take of it.

Has this Court jurisdiction over the subject matter of, and over the parties to, the Bill in Equity now pending? And has this Court now power to proceed to the hearing and trial of the cause; and to make a final decree therein?

If neither branch of this question can be answered in the negative, there can be no good ground for this motion: however those grounds may be shifted or multiplied or repeated. Allow me to consider the first branch of this question. It is evidently purely a Constitutional question; arising

under the Constitution, and only to be tried and settled by it. Turning then to the Constitution, we find it there declared, that the judicial power shall extend *"to controversies between two or more States."* And that in those cases *"in which a State shall be a party, the Supreme Court shall have original jurisdiction."* These are the words of the Constitution; and this is a controversy between two States; the State of Massachusetts is a party to it, and the State of Rhode-Island is a party to it; and this controversy is now pending before the Supreme Court.

But it is contended that, although the words of the Constitution do embrace this controversy, yet it is not within the meaning and intention of that instrument; and that it was the intention of its framers to exclude such controversies from the jurisdiction of the Supreme Court. This is dealing with the Constitution as Peter, Martin and Jack dealt with their father's will. And it is from necesity that they do so; for no other pretension can be set up against the constitutional jurisdiction of this Court. It is therefore important for us to inquire strictly what was the meaning and intent of the framers of the Constitution in this respect. And here, fortunately, nothing is left to conjecture or tradition. The explicit, unequivocal intention of the framers of the Constitution upon this subject is matter of authentic public record. I beg leave to trace this Constiutional provision for preserving peace between the States from its origin. Before

the Revolution, all controversies between the Colonies or provinces concerning boundaries, were carried up to the King in council, and were by him settled. There was one such controversy between the same parties, Massachusetts and Rhode-Island; and another between Massachusetts and New-Hampshire; both of which were so settled. When the States asserted their independence, that tribunal of course was annihilated; but the new States felt the necessity of immediately establishing, in its place, a competent tribunal of their own, with full jurisdiction over those dangerous controversies; and this they did in the "Articles of Confederation," from the ninth article of which I read: "Congress shall be the last resort on appeal in all disputes and differences *now* subsisting, or which may hereafter arise, between two or more States, concerning boundary, jurisdiction, or any other cause whatever, to appoint judges, to constitute a court for hearing and determining those causes; and the judgment or sentence of the court shall be final and conclusive; and if any party refuse to appear, or to defend, or to submit, the court shall nevertheless proceed to pronounce sentence or judgment, which shall, in like manner be final and conclusive: the judgment or sentence and other proceedings being lodged among the Acts of Congress for the security of the parties concerned." And Congress did accordingly establish and organize the court called the Court of Appeals; and that court took cognizance of and decided a

number of jurisdictional controversies between States; and among others, one in which Massachusetts herself was a party, and acknowledged the jurisdiction of the court; and acquiesced in its decision.

It must be recollected that the territorial descriptions and boundaries contained in the original Colonial grants and charters were necessarily loose and defective; and that in the progress of the settlements in adjoining colonies, controversies must unavoidably arise, as to their respective limits; and the greater the certainty of such conflicts the greater was the necessity of providing an impartial tribunal for the peaceable adjustment of them. The language of the ninth article, just read, is descriptive of the state of things at that time; "disputes and differences now subsisting or that may hereafter arise between two or more States concerning boundary, jurisdiction," &c.

The Court of Appeals retained and exercised its jurisdiction over these controversies until the adoption of the present Constitution; when its place was supplied and the exigency provided for, by the establishment of a national judiciary, with full jurisdiction over the same controversies. And by Section 12 of the Act "for regulating processes," &c., passed in 1792, it was enacted "that all the records and proceedings of the Court of Appeal heretofore appointed previous to the adoption of the present Constitution, shall be deposited in the office of the Clerk of the Supreme Court of the United

States, who is hereby authorized and directed to give copies of all such records and proceedings to any persons requiring and paying for the same, in like manner as copies of the records and other proceedings of the said Court are by law directed to be given; which copies shall have like faith and credit as all other proceedings of the said Court."

The Counsel of Massachusetts have expressed the idea that the United States came into existence with the present Constitution: and that Massachusetts as one of them, is bound by nothing before that date. This is a strange conception indeed. Not only the States, severally, but the United States, came into existence upon the Declaration of Independence. And the first of the Articles of Confederation ordains that, the style of this Confederation shall be " The United States of America." It was "to form a more perfect Union," and to strengthen the Confederation, that the Convention was called which formed this Constitution. And here are the concluding words of the resolution of the old Congress of 1787, recommending the call of the Convention, " for the sole and express purpose of revising the Articles of Confederation," &c.

The Convention met, and in revising the important 9th Article, changed the words "disputes and differences" to the word " controversies," taking the words " between two or more States" as they found them in that article. Not deeming it proper in a permanent Constitution to designate particular ex-

isting (and it might be hoped temporary) disputes between States, they used the comprehensive word "controversies" as fully including them all. We do not know that controversies of any other kind than those mentioned in the Article then existed; and if there did, they must have been comparatively unimportant: none other were so likely to exist or to be carried to extremities: therefore the Article after the words "boundary and jurisdiction" merely adds the general expression "or any other cause whatever:" apparently by way of precaution. The Delegates from the several States knew that a number of those State controversies still existed; and that more might arise; and they were fully sensible how important it was to provide against their breaking out. The tribunal was of course changed; for now an independent Judicial Department was established, which had no existence under the Confederation. The great object of the Convention was, (as expressed in the preamble to the Constitution,) "to form a more perfect Union; establish justice; secure domestic tranquility; provide for the common defence; promote the general welfare; and secure the blessings of liberty to ourselves and our posterity."

And how was union to exist, how domestic tranquility, amidst contention among the members? How was justice to be established, if the strong were permitted to give law to the weak; and how were the rights of individual States to be preserved, if left unprotected from the encroachments of stronger

neighbors? And what would become of the integrity and harmony of the Union, if all its members were not protected in the enjoyment of their equal rights.

And in addition to all this, it is a remarkable fact, that this very question of jurisdiction, which the State of Massachusetts now brings up, after the lapse of full half a century since the formation of the Court; this very question was directly decided by the Convention itself, as appears from the record of its proceedings. During its deliberations, the question was expressly and distinctly raised, whether controversies between States, concerning jurisdiction and boundaries, should not be excluded from the jurisdiction of the Court: and the Convention decided that they should not be excluded: and the provision in the Constitution, as it then was and still is, was retained. And this Constitution was unamimously agreed to by all the Delegates: and afterwards the same question was discussed in the State Conventions: and this provision was still retained and approved of, and the Constitution ratified by every State. And several years afterwards when the eleventh amendment to the Constitution was adopted, and suits "against one of the United States by citizens of another State, or by citizens or subjects of any foreign State," were excluded from the jurisdiction of the Court; the remainder of the provision, giving jurisdiction over controversies between two or more States, was preserved untouched; and the States thereby manifested their

continued approbation of that provision. And accordingly this question of jurisdiction has long been settled in this Court, by its uniform practice and decisions in numerous cases from its first establishment.

And now what is it Massachusetts has to say to all this? I beg the Court to consider whether every single objection and the whole argument, on her part, have not been objections and argument against the Constitution itself, rather than against the constitutional jurisdiction of the Court. In opposition to the Constitution they come armed with political axioms, and abstract theories of government, and with the aid of Montesquieu, and other elementary writers, reason very learnedly upon the science of government, and the distribution of appropriate powers among the three great departments.

Allow me sir to present a summary of the principal tenets and positions with which the Counsel of Massachusetts have most pleased themselves.

They lay it down that *a controversy between States*, concerning jurisdiction and boundaries *is political* not *judicial* in its character. The Judicial Courts can take cognizance only of controversies strictly judicial, not political in their nature. That the present controversy concerns jurisdiction and sovereignty, and is therefore out of the judicial jurisdiction of this Court, and cannot be acted upon by it without the assumption of political power. And, in support of their doctrine, the Counsel have read

a number of English cases and the opinions of learned English Chancellors. And what does it all amount to? Does it amount to any thing more than the plain, self-evident proposition, that Courts created by sovereign power, and subordinate to it, cannot exercise jurisdiction over sovereign power, nor interfere with its prerogatives? Let us see if this is not the whole sum and substance of the doctrines.

In illustration and support of their position, the Counsel have referred to the controversies between the Colonies, concerning their boundaries, over which controversies, the (English) Courts exercised no jurisdiction. And why did they not? It was because there was a higher tribunal which the Colonies appealed to. The jurisdiction in those cases was in the King himself. He made the Colonial grants, and gave the charters, reserving in them all, allegiance and fealty to himself. He appointed the Colonial governors, not exepting the Governor of Massachusetts. The Colony of Rhode-Island, almost alone, elected her own Governor. The King therefore claimed and exercised jurisdiction over the Colonies as their feudal Lord. But he might, had he so pleased, have transferred his royal jurisdiction over those controversies, to any of his courts; and had he done so, those controversies, whatever their character, and by whatever name called, political or not, would have become the proper subjects of judicial investigation and decision. Another case much relied upon by the Counsel of Massachusetts was that of the Nabob of the Carnatic against

the East India Company; of which case the Court of Chancery declined taking jurisdiction, because one of the parties was a sovereign Prince, and the other (although subjects of the Crown) acting by virtue of its charter as an independent State. It seems that in this instance its charter had placed the Company beyond the reach of the Courts of Justice. But suppose that its Charter had subjected it to the jurisdiction of the Court of Equity in any controversies it might have with any of the surrounding Princes, would the character of the parties, (the Sovereign Prince assenting to the jurisdiction) or the nature of the controversy, have formed any obstacle to the exercise of that jurisdiction; and would not the exercise of it have been strictly judicial in its character? The same plain principles of exposition embrace, reach, and dispose of, every case and instance which the Counsel have brought or can bring to sustain their doctrine. All their cases are governed by the peculiar institutions of England and the structure of her Government in its various branches. No such question as this, of jurisdiction in controversies between two States of this Union, could arise in the English Courts. If this jurisdiction is vested in the Court by the Constitution, how preposterous is it to talk of the nature of the controversy or the character of the parties. Suppose the controversy is political in its nature, what then? Is there any reason in nature why it should not be subjected to judicial investigation and decision, as much as any other

controversy? Suppose the parties to it are two States: what then? Is there any reason in nature why they should not submit to be governed by the principles of justice, as much as any other parties? All controversies, whatever their character, and whoever the parties, if they are ever settled, and the parties will not settle them amicably, must either be settled by force or by the judgment of some tribunal. When the contest is between sovereigns the sword is the last resort—*the ultima ratio regum*—and the contest is waged at the expense of the blood and lives of their subjects. But if the controversy is submitted to some independent tribunal, that tribunal, call it by whatever name we please, must act judicially.

It is not in my power to perceive how the sovereignty of Massachusetts is concerned, as she alledges, in the settlement of this question. Even absolute Sovereigns have submitted their controversies about territorial limits to independent tribunals; and no one ever imagined that the sovereignty of either was affected by their doing so.

But Massachusetts is not possessed of unlimited sovereignty. She is no more sovereign than any other State. All the States, when they ceased to be Colonies, became sovereign and independent. But they were all perfectly sensible, that they could not remain so, if they remained disunited. They knew that it was by union alone they could preserve their liberties. They did unite; and, to secure their great object, they established this limited

government of the Union; investing it with a portion of their State powers and at the same time restricting themselves in the exercise of certain other powers. Thus both the federal government and the State Governments are but limited governments. They are both equally bound by the Constitution, and all acts of either, violating the Constitution, are void. And it is the constitutional province and duty of this Court to declare such acts void, whenever the question of their constitutionality regularly comes before it. For in the formation of this federal republican system, an independent judicial department was deemed to be a necessary branch of the government; to prevent encroachments, and preserve a just equilibrium.—And therefore the Constitution declares that "the judicial powers shall extend to all cases in law and equity arising under this Constitution." And every decision of the Court upon the constitutionality of an act either of Congress or of a State Legislature concerns their respective jurisdiction. How absurd then is it to contend that the judicial power does not extend to *political* questions or to questions in which the jurisdiction of a State is concerned. The only question here is whether the States, by the Constitution which they formed and adopted, did confer the jurisdiction upon the Supreme Court. And is it not amply shown that they did confer it? and that they unequivocally declared it to be their intention to confer it? And is it for Massachusetts to gainsay this? Massachusetts possessed a larger

share of sovereignty under the Confederation than she does under the present Constitution: yet she then agreed and assisted in constituting the Court of Appeals; with full and express judicial power over this very controversy which was among the then *subsisting* controversies concerning State boundary and jurisdiction specified in the Article. In the Convention also which formed the present Constitution Massachusetts agreed to invest this Court with the same jurisdiction: and again in her State Convention which ratified the Constitution she approved of and adopted this provision. And during all this period of time, Massachusetts had subsisting controversies with her neighbor States concerning her territorial boundaries and jurisdiction, particularly this with the State of Rhode-Island, and another with the State of Connecticut, which last was not terminated until the year 1804. Massachusetts therefore by her own consent and acts gave jurisdiction to this Court over this very controversy. With what consistency then, or sense of justice can she appear here and dispute the jurisdiction of this Court; and set up her sovereignty and jurisdiction. Is she not setting at defiance the Constitution itself as well as this Court?

I must take it for granted that it is fully shewn that "*this Court has jurisdiction over the subject matter of, and over the parties to the Bill in Equity now pending before it.*"

I will proceed then to the consideration of the second Question. "*Has the Court now power to*

proceed to the hearing and trial of this cause and to make a final decree therein?"

Mr. Justice Barbour, asked Mr. Hazard, if he could point out any process by which the Court could carry its final decree in the cause into effect, should it proceed to make one. For instance, if an application should be made by Rhode-Island for process to quiet her in her possession, what process could the Court issue for that purpose? Mr. Hazard said that he had by no means forgot that important question and had given to it the fullest and most attentive consideration in his power. But he thought that it would be proper to reserve that question for the last to be considered as it seemed in point of order to be. At present he was desirous of showing that the Court had full power, and ought, to proceed to the hearing and to make a final decree in the cause.

And what is there to prevent their proceeding? The Court has jurisdiction over the subject matter; and over the parties; and the parties are here before the Court. The Defendant State obeyed the subpœna issued by the Court and came in, more than three years ago, and took upon herself the defence of the suit; and put in her plea and answer thereto. At another term she applied to the Court for a rule upon the Complainant to reply; and at the last term she made a written agreement with the Complainant respecting amendments of the Bill and Pleadings; and she is now here in Court. What is there to prevent the cause from proceeding?

Why, it is contended that the consent of the party cannot give jurisdiction to the Court; and, unnecessarily, authorities have been read to this effect. No one doubts when it appears by the Record that the Court have no jurisdiction of the subject matter of a complaint the consent of a party cannot confer jurisdiction. But when the Court has jurisdiction of the subject matter of the suit, the party defendant can consent to appear, and his appearance is conclusive upon him, even though, if he had not appeared, he might not have been reached by the process of the Court. Pollard v. Dwight, 4 Cr. 421 —" The appearance of the Defendants to a foreign attachment in a Circuit Court of the United States where they do not reside is a waver of all objections to the non-service of process on them."—Knox v. Summer 3rd. Cr. 496,—" An appearance of the Defendant cures all antecedent irregularity of process."

But Massachusetts has raised a number of other obstacles to the Court's proceeding to the hearing of this cause: and the following summary, I believe, contains the substance of them all. They are— *First*, That the sole object of the Court is to expound and administer the law; and that here there is no law for the Court to expound or administer— that Congress has passed no act defining the controversy—that Congress has passed no act prescribing the rule by which to try it; no rule of decision. *Second*, That by the 13th section of the Judiciary Act of 1789, Congress has limited the jurisdiction

of this Court, where a State is a party, to controversies of a civil nature which this controversy is not, being political in its nature; and that therefore Congress meant to exclude controversies of this character from the jurisdiction. *Third*, Congress has passed no act providing the process necessary to enable the Court to exercise its jurisdiction in the case. *Fourth*, That the Court possesses no power to carry a final decree in this case into effect should it make one; for Congress (as is alledged) has passed no act to enable it to do so.

The last of these objections I will consider presently by itself. And as to the rest, if such doctrine is to prevail, what becomes of the jurisdiction expressly vested in the Supreme Court by the Constitution itself? And what becomes of the Court itself, if it is to be placed upon the same footing as the inferior Courts which Congress has power to establish and of course to regulate? By the 8th section, 1st article, Congress has power "to constitute tribunals inferior to the Supreme Court. And by the 1st section, 3d article, "The Judicial power of the United States shall be vested in one Supreme Court and such inferior Courts as Congress may, from time to time, ordain and establish." But the Supreme Court was ordained by the Constitution itself; and necessarily possesses all the judicial powers incident to such a Court: otherwise the Constitution might be defeated and the Supreme Court rendered a nullity by the act of another and co-ordinate branch of the Government. But Con-

gress has no power to deprive this Court of its constitutional jurisdiction; nor to restrain it in the exercise of that jurisdiction. And this Court would declare unconstitutional and void any act of Congress having that object. The case of Martin v. Hunters lessee (first Wheaton) has been referred to and much stress put upon some general remarks of Mr. Justice Story who delivered the opinion of the Court in that case. Those remarks were concluded in the following words which were not read but ought to go with them—"We do not however place any implicit reliance upon the distinction which has been stated and endeavored to be illustrated."—But, what shows most conclusively that the Counsel are wholly mistaken in their understanding of the scope and bearing of those remarks is the fact that in the case of New Jersey v. New York which was before this Court sixteen years later than that of Martin v. Hunters lessee, the Court of which that Honorable Judge was one (and not dissentient) not only took jurisdiction of the case, although the State of New York had refused to appear, but decided that "the complainant according to the practice of the Court and according to the general order made in the case of Grayson v. the Commonwealth of Virginia has a right to proceed *ex parte*, and the Court will make an order to that effect that the cause may be prepared for a final hearing," and decreed and ordered that "the subpœna in this cause having been returned executed sixty days before the return day thereof and the Defendant not

appearing, the Complainant be at liberty to proceed *ex parte*," and in that case, all the prior cases in which a State was a party as far back as 1792 (forty years) were referred to as authorities and the several general orders adopted by the Court from time to time for regulating the process and practice in such existing cases were recognized as the standing orders of the Court. But, sir, it is wasting time I fear to dwell upon this objection after it has been so clearly shewn that cases of this kind were expressly and intentionally included in the jurisdiction of this Court by the Constitution.

Suppose Congress was to pass an act declaring that the Judicial power should not extend to any controversy between two or more States; and, notwithstanding such act, a suit should be instituted in this Court, by a State against another State, and the act of Congress should be pleaded in bar. I believe this Court would look to the Constitution for its jurisdiction, and by virtue of the Constitution, would declare the act of Congress unconstitutional and void. I was quite at a loss to understand what was meant by "a rule of decision, a rule to try the case by," until the Counsel enlightened me by enquiring how, without an act of Congress, the Court was to know which State was right and which wrong: alledging that there being no such act, the court had no authority to proceed by the rule of the common law, or that of the civil law, or of any State law. This is a novel idea: such an idea was vastly beyond the conception of the men, (delegates

from all the States, and the foremost men of all this world,) who framed the Articles of Confederation. It did not enter into their heads that any thing more was necessary to be done to meet the exigences, than to establish a competent court, with sufficient powers to call the parties before it, to try and determine their controversies in the same manner as they would try and determine controversies between any other parties. And it seems that that Court of Appeals entertained the same idea of their province and duties, and found no difficulty in performing them; governing themselves by the principles and rules of justice, equity, and good conscience, and not deeming that any other rule of trial or decision, was furnished by the common law, the civil law, or by any state law.

The 34th Section of the Judiciary Act, has been turned to again and again, as shewing that Congress had furnished a *rule* of decision in cases at common law; but no such rule for cases like the present. This is making a strange use of that short section of four lines; the whole purpose of which, is to give efficacy to the local state laws, in trials at common law in the courts of the United States, "in cases where they apply." That is, that cases arising under a local law, shall be governed by that law. Thus the state laws regulating the descent of real estates, or the rate of interest, for instance, ought in all courts to govern the cases arising under those laws: and this is the whole meaning of the section. The Counsel have contended that if

Rhode-Island could institute any suit at all against Massachusetts, it ought to have been a suit at common law, and not in equity. But no state law could apply to such a suit any more than to the present. And there are many suits at common law which are not governed by any state law. This 34th section therefore, only gives a rule of decision in certain particular local cases, if I may so call them.

An expression, (the word *civil,*) used in the 13th Section of the same Act, is also seized upon by the Counsel, as containing an important secret meaning, which the Counsel think they have discovered. And they insist that by the use of that word civil, Congress intended to take this controversy, and all of the same kind, out of the jurisdiction of this Court. Surely the Counsel of Massachusetts must feel themselves under the necessity of going a great way after inferences, and set a great value upon very slight ones, to draw them from such sources as these. The words relied upon are: "That the Supreme Court shall have *exclusive* jurisdiction of all controversies of a civil nature where a State is a party." The plain object of Congress was to withhold from the lower courts jurisdiction in controversies between two or more States, and to do this, they gave the Supreme Court *exclusive* jurisdiction in those cases, instead of *original* jurisdiction merely, which was given to it by the Constitution. The word civil is properly used, because all controversies which do, or can

exist between two or more States, must be of a civil nature, and none other, unless they engage in actual war, which they have bound themselves by the Constitution not to do. The word civil does not mean amicable or peaceable. Actions of trespass and of ejectment are civil actions. The word *civil* is technically and generally used in contra-distinction to criminal. There is not the slightest ground for supposing that the word civil was intended to be used in contra-distinction to political. Congress would never have taken so blind and trackless a way to effect such an object as the Counsel of Massachusetts wish to effect. Nor can any such distinction be made. If this is a political controversy, it is also a civil controversy. And if such a distinction is forced upon the words, it would bring the section to this construction: that the court is left to its *original* jurisdiction, derived from the Constitution in this and other like controversies, but does not take *exclusive* jurisdiction of them by virtue of this 13th section of the Judiciary Act.

But, Sir, there is another word in the front part of this section, which, in its plain common sense meaning, I think is much more significant than the word which the Counsel have endeavored to render so cabalistic, and that is the word *all*—*all* controversies. This same word used in another place has been thought an all important word, and great respect has been shewn to it by the Counsel of Massachusetts. By the Constitution, Article 3d, Section 2d: "The Judicial power shall extend to all

cases in law and equity, arising under this Constitution," &c., "to all cases affecting ambassadors," &c., "to all cases of Admiralty and maratime jurisdiction—to controversies to which the United States shall be a party—controversies between two or more States," &c., &c. And because the repetition of the word all is not kept up throughout the whole section, it is infered that the Constitution intended to confer a less extensive jurisdiction in some of the causes enumerated, than in others. Now Sir, Congress did not deal in such far fetched inferences. Congress saw no such meaning in that section, and therefore, it declares in this 13th section: "That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party," &c. Congress did not intend to alter the Constitution. It merely expressed what it understood to be the meaning of the section referred to. Now although I have no quarrel with the word *civil*, I should not be willing to give the word *all* in exchange for it. But, Sir, why is it that so much effort is used, to induce this Court to believe that Congress is unfriendly to its jurisdiction over these cases? This is not very lawyer-like, nor very respectful to this Court. This Court, as I have before remarked, will look for its constitutional powers to the Constitution itself; and will not allow any other department to construe that instrument for them. In very many cases, this Court have accurately defined not only its own constitutional powers, but those of the other

departments, legislative and executive, as by the Constitution it is authorised, and bound to do on proper occasions. And let me ask, if Congress possess such power as is now contended for, over the jurisdiction of this Court, why was it necessary for the States themselves to make the 11th amendment to the Constitution, for the purpose of taking away the jurisdiction in suits "against one of the United States by citizens of another State, or by citizens or subjects of a foreign State."

But, Sir, it is not true that Congress is unfriendly to this jurisdiction. There is no single instance in which Congress has manifested any such disposition. On the contrary, in this same section of the Judiciary Act, we find it conferring exclusive jurisdiction in these very cases, where by the Constitution, the court only had original jurisdiction. And without any appearance of disapprobation, Congress has seen this Court, from its first establishment, exercising its constitutional powers in these cases, and in others, in which a State was a party—adopting its rules of practice and proceeding, and its general permanent orders applicable to them; and prescribing, regulating its processes and the services and return of them as occasion required.

The third objection is, that Congress has provided no forms of process to enable the court to exercise its jurisdiction. This objection, I should think, by this time, was reduced to a very small size. The writ of subpœna was issued, served and

returned according to the several orders of the court, and the Defendant State obeyed the process, and appeared and took upon herself the defence of the suit brought against her, and I understood her counsel to say, that he should not urge any objection to this proceeding of the court. And, if Massachusetts had refused to appear, the court would have had it fully in its power to have proceeded in the cause, as it did in that of the State of New-Jersey, against the State of New-York. But Massachusetts has appeared, and is now in court. What further process then is now wanting to enable the court to proceed to the hearing of the cause. I know of none. Yet the Counsel of Massachusetts still insist that the court cannot go on a step, without an act first passed by Congress.

Let me then inquire: 1st, what has been done by Congress. And 2d, what has been done by the Court.

1st. A Judiciary Act was passed in 1789, at the first session of the first Congress, and a process Act at the same session, which, with large additions, was rendered perpetual by a second process Act, passed in 1792. The 13th section of the Judiciary Act, which gives exclusive jurisdiction to the Supreme Court in these cases, has already been read. The 14th section enacts "that all the before mentioned Courts of the United States, shall have power to issue writs of scire-facias, habeas-corpus, and all other writs not specially provided by Statute which may be necessary for the exercise of their

respective jurisdictions agreeably to the principles and usages of law." The 17th section enacts that " all the before mentioned Courts of the United States shall have power to make and establish all necessary rules for the ordinary conducting of business in said Courts, provided such rules are not repugnant to the laws of the United States." The 18th, 24th and 25th Sections recognize the power of the Courts to issue executions upon its judgments and decrees. The process act 1st Section, enacts that " all writs and processes issuing from a Supreme or a Circuit Court shall bear the test," &c., and shall be signed by the Clerk and sealed with the seal of the Court. The 2nd Section enacts " that the forms of writs, executions and other process, except their style and the forms and mode of proceeding in suits in those (Courts) of Common law shall be," &c.: and in those (Courts) of Equity, and in those of Admiralty and maritime jurisdiction according to the principles, rules and usages which belong to Courts of Equity and to Courts of Admiralty and maritime jurisdiction respectively, as contra-distinguished from Courts of Common law; except as far as may have been provided for by the Act to establish the judicial Courts of the United States: subject however to such alterations and additions as the said Courts respectively shall in their discretion deem expedient or to such regulations as the Supreme Court of the United States shall think proper from time to time by rule to prescribe to any Circuit or District Court concerning the same.

Thus much has been done by Congress. And it is apparent that that Department has always considered that every thing had been done on its part necessary to enable the Courts to perform all right judicial duties, and fully and perfectly to exercise their judicial functions and powers. Congress saw that the Courts were proceeding in the exercise of those powers without difficulty or impediment; and that no farther Legislative action was called for or needed. And so have the Courts thought. In the case of Wayman v. Southard (10 Wheat. 1.) the Court considered itself possessed of full power over the whole proceeding, in suits in equity, from their commencement to their final termination, by satisfaction of the decree or judgment.

It has been suggested by the Counsel of the Defendant that Congress has omitted to provide for the exercise of this branch of the jurisdiction of the Court, because it did not intend that it should be exercised. This is a direct impeachment of the fidelity of Congress to the Constitution. But fortunately the imputation is wholly unfounded. It has been alleged also that Congress by the Judiciary act of 1789 has provided rules of proceeding in all or nearly all the ordinary cases which can arise, but not in such cases as this. This is as palpable an error as could well be committed. In the case last mentioned (Wayman v. Southard), which was a case at Common law, objections were made to the process and to the service and execution of it, and it was contended that the proceedings were not au-

thorized by any act of Congress. But the Court after remarking that the Chancery powers of the Court over all the proceedings in suits in Equity from their commencement to their final termination were unquestionable, proceeded to remark "that it would be difficult to assign a reason for the solicitude of Congress to regulate all the proceedings of the Court sitting as a Court of Equity or of Admiralty, which would not equally require that its proceedings should be regulated when sitting as a Court of Common law." Thus we find that while the Equity powers of these Court in these cases is considered as having been placed beyond a doubt by the acts of Congress its parallel power in cases of Common law, have required to be sustained by inferences and reasoning from analogy.

And it has been decided in the case last referred to, and again in that of the United States Bank v. Halstead, that these powers are not legislative in their character: they must then be simply judicial in their character, and, if necessary, must be part of the judicial function and incident to the judicial power.

Let us now see what has been done by the Court in pursuance of its constitutional and legal powers.

In 1791, the Court adopted the following general order, viz: "that this Court consider the practice of the King's bench and of Chancery in England as affording outlines for the practice of this Court, and that they will from time to time make such alterations therein as circumstances may ren-

der necessary. 1. Cond. Rep. VIII. In 1796 the following permanent general orders, or rules, were established, viz: "1st. Ordered that when process at Common law or in Equity shall issue against a State the same shall be served upon the Governor or chief executive magistrate, and the Attorney General of such State. 2nd. Ordered That process of subpoena issuing out of this Court in any suit in equity shall be served on the defendant sixty days before the return day of the said process and further, that if the defendant on such service of the subpoena shall not appear at the return day contained therein the Complainant shall be at liberty to proceed *ex parte*." 3 Dall. 320; 1 Peters Cond. Rep. 141. These several general orders or rules are still in full force and have been practiced upon by the Court from the time of their adoption. Can there be a doubt that they are strictly in conformity to the Constitution and the Acts of Congress before referred to?

In the case of the State of New Jersey v. the State of New York (5 Peters, 1831) the Court remark "that, at a very early period of our judicial history, suits were instituted in this Court against States, and the questions concerning its jurisdiction and mode of proceedings were necessarily considered." The Court then proceed to review a number of preceding cases, which had been before the Court, in which a State had been a party. So early as 1792 (says C. J. Marshall, who delivered the opinion of the Court,) an injunction was award-

ed at the prayer of the State of Georgia, (the State of Georgia v. Brailsford 2 Dall. 402) to stay a sum of money recovered by Brailsford, a British subject, which was claimed by Georgia under her acts of confiscation. This was an exercise of the original jurisdiction of the Court; and no doubt of its propriety was ever expressed. In February, 1793, the case of Oswald v. the State of New York (2 Dall 402) came on. This was a suit at Common law. The State not appearing on the return of the process, proclamation was made, and the following order entered by the Court—"Unless the State appear by the first day of the next term, or show cause to the contrary, judgment will be entered by default against the said State. At the same term a like order was made in the case of Chisholm Executors v. the State of Georgia, and at the next term (1794) judgment was rendered in favor of the Plaintiff; and a writ of enquiry awarded Grayson v. the State of Virginia, 1796, 3 Dall. 320. 1 Peters Cond. Rep. 141. It was in this case, which was a bill in Equity, that the Court adopted the two last general orders before mentioned. "In Huger v. the State of South Carolina, the service of the subpœna having been proved, the Court determined that, the Complainant was at liberty to proceed *ex parte*. He accordingly moved for and obtained commissions to take the examination of witnesses in several of the States," 3 Dall. 371: 1st Peters Cond. Rep. 156. The Court also noticed the cases of Fowler et. al. v. Lindsey et. al. and Fowler

v. Miller, 3 Dall. 411 : 1 Peters Cond. Rep. 189; and the State of New York v. the State of Connecticut 4 Dall. 1. and 1. Peters Cond. Rep. 203.

"It has then (proceeded the Chief Justice) been settled by our predecessors on great deliberation that this Court may exercise its original jurisdiction in suits against a State under the authority conferred by the Constitution and existing acts of Congress. The rules respecting process, the persons on whom it is to be served, and the time of service, are fixed. The course of the Court, on the failure of the State to appear, after due service, has been also presented." And accordingly the Court did proceed and made the order, which thus concludes —"and it is further ordered that unless the defendant, being served with a copy of this decree, sixty days before the next ensuing August term of this Court, shall appear on the second day of the next January term thereof, and answer the bill of the Complainant this Court will proceed to hear the cause on the part of the Complainant and to decree on the matter of said bill."

But before the cause came to a final decree the State of New York compromised the controversy with New Jersey, to the satisfaction of the latter State.

The case now before the Court is the same in character, and in all the principles involved in it, as that of New Jersey v. New York. Why should not the Court proceed in this case as they decided to do in that; and in conformity to its subsisting rules and orders?

With permission of the Court, Sir, I will now proceed to consider the last objection which has been raised by Massachusetts to the jurisdiction of this Court and upon which she appears mainly to rely for producing an effect upon the minds of the Court. That objection is, that should this Court make a final decree in this cause it will have no power to carry it into effect.

When the clear and explicit provisions of the Constitution are considered and the several laws subsequently passed by Congress, for the purpose of aiding in the fulfilment of those provisions, so far as might be proper and useful, I cannot conceive how any doubt can exist of the power of this Court to carry into effect any decree which by those provisions it may be authorized and bound to make. And, if the Constitution stood alone I should entertain the same opinion. It is a universal axiom that the grant of any specific power, *ipso facto*, includes in it all the minor subsidiary powers necessary for the exercise of the main power and as incident to it. What a construction would it be to put upon the Constitution, that the people, by that instrument, had ordained and established a tribunal to take cognizance of and determine certain enumerated controversies, over which for that purpose they had given full and express jurisdiction; but that the tribunal so established could not perform its duty, nor accomplish the object of its creation, for want of power to regulate the modes and forms of its own proceedings, and to perform the work it was order-

ed to perform? What would the people have a right to say to a tribunal which should render to them such an account of its official conduct; or rather such an excuse for the neglect of its duty.

But Sir is it not important here to inquire, whether, in considering the present question of jurisdiction and power of the Court, to hear, try, and make a final decree in this cause, it can be at all necessary or useful to inquire, what further powers the court may or may not exercise upon any future distinct application, which may or may not hereafter be made to the Court; and upon which new and distinct application, should any such be hereafter made, the Court will decide as it shall deem right?

If by the Constitution and existing laws the Court have jurisdiction over the cause, to hear try and decide it, is it not bound to exercise that jurisdiction, when appealed to, for the exercise of it?—And ought the Court to decline exercising this unquestioned jurisdiction from an apprehension that possibly, it may hereafter be asked to do something more which, possibly, it may not have it in its power to do? In the case of New Jersey and New York, the Court said, "that inasmuch as no final decree has been pronounced or judgment rendered in any suit heretofore instituted in this Court against a State, the question of proceeding to a final decree will be considered as not conclusively settled until the cause shall come on to be heard in chief. Thus the Court determined to hear the cause in chief, with-

out anticipating what its final decree might be; much less what, if any thing, might remain to be done after the decree; and the Court did then decree, that the Complainant be at liberty to proceed *ex parte*: and further, that unless the defendant State appeared, &c., by the day fixed, the Court would proceed to hear the cause on the part of the Complainant and to decree on the matter of the said bill. There are many cases in which decrees in Chancery cannot be fully if at all executed; but that has never been considered a reason why the Court should not pronounce the decree which it has power to pronounce.

But Sir I shall not dwell longer upon these questions, because there is another position which, if sound, I think entirely obviates the objection of the want of power in the Court beyond the power of making a final decree in the cause. That position is, that the pronouncing of a final decree in this cause, ascertaining the true boundary line between the two States, will complete the exercise of all the jurisdiction which the cause can require, and will be a final, conclusive, and permanent termination of that cause.

This position, upon much reflection, I believe to be sound, or I certainly should not venture to advance it before the honorable Court as I do entirely upon my own responsibility as to its soundness or unsoundness.

A final decree in this cause will have no resemblance to a judgment of Court for a sum of money,

to be levied and collected by execution, nor to a judgment in ejectment, to be followed by an execution for possession. No process would necessarily follow a final decree in this cause. We ask no damages of Massachusetts; no delivery of possession; no process to compel her to do or undo any thing. All we ask is a decree ascertaining and settling the boundary line between the two States.

Mr. Justice Thompson asked if the bill did not contain a further prayer; a prayer that Rhode-Island might be restored to her rights of jurisdiction and sovereignty over the territory in question, and quieted in her enjoyment of them? And, that part of the bill being read, it appeared that it did contain such a prayer, in addition to the prayer that the boundary line between the two States might be ascertained and established. Mr. Hazard said that the latter part of the prayer of the bill had escaped him; but it did not vitiate the bill. The Court would have it in its power to grant so much of the prayer as it might think right. All that Rhode-Island asked for was a decree establishing the true boundary line between her and Massachusetts. When the boundary line is settled by the decree, the rights of jurisdiction and sovereignty necessarily follow. The decree will execute itself, and this controversy will be conclusively and permanently settled, and can no longer exist. When the boundary line is settled, it will be the same as all other established boun-

daries, and the relative situation of Massachusetts and Rhode-Island will be the same as that of all other adjoining States. And why should not Rhode-Island be placed upon the same footing, in this respect, with her sister States? Why should her jurisdictional boundary line be left in dispute, and she exposed to encroachments, when all other controversies of the kind have been lastingly settled. It is true that, after the line is settled, Massachusetts may do other wrongs to Rhode-Island, for which other remedies may be necessary. So she may to any other State. But this controversy will be at an end, and there can no longer be any dispute between her and Rhode-Island about this boundary line.

Am I not sustained in the position I have here taken by the opinions and acts of the learned men who framed the Articles of Confederation? They enacted that the decrees of the Court of Appeals should be final and conclusive, and it was their opinion that nothing more than a final decree was necessary, and, therefore, they provided for no further proceedings; and, what ought to be conclusive, is the fact, that, although a number of decrees, in such cases, were made by the Court of Appeals, no difficulty was ever experienced, and no further process was ever found to be necessary.

Should Massachusetts hereafter encroach upon Rhode Island, that will be a new aggression, the same as if she should encroach upon any other State, near or distant; the same as if she should

encroach upon the State of New-York, or Connecticut, or New Hampshire, or again upon Rhode-Island on her eastern boundary; with all which States Massachusetts has had controversies about her boundaries. But when those boundaries were ascertained, by the competent tribunal, all difficulties were at an end. When Rhode Island, upon the decision of the King in Council, received under her jurisdiction her county of Bristol, and her towns of Tiverton and Little Compton, of which Massachusetts had long possessed herself, she met with no obstructions from that State; neither did the State of New Hampshire, whose controversy with Massachusetts was decided by the same tribunal.

Still, the Court are told by Massachusetts that they cannot carry their decree into effect. Allow me to ask, Sir, in what possible way Massachusetts can have it in her power to defeat or evade the effect of that decree. The decree itself, the moment it is pronounced, will establish a new state of things between Massachusetts and Rhode-Island. And what are the means that Massachusetts can resort to, to prevent that decree from taking full effect, by its own force and operation? I should be glad to hear the Attorney General of Massachusetts inform the Court what it is that that important State is going to do to set the decree of this Court at defiance, and render it a nullity. Massachusetts is not going to erect a line of batteries along this strip of land, nor to station a mili-

tary force there to take hostile possession of it. If she should, it will be an invasion; an ample remedy for which is provided in another part of the Constitution, the fourth section of the fourth article. Rhode-Island would be under no necessity to apply to this Court for an injunction or other relief in such a case. And this, again, shows the meaning and propriety of the expression, "civil controversies," used by Congress and meant by the Constitution. I ask again, then, what can Massachusetts do to prevent a decree of this Court taking full effect by its own force and operation? She can only say that she will retain jurisdiction over this district, notwithstanding the decree. But let me examine what she can make this amount to. Massachusetts, as a State, is not the proprietor of this strip of land. If she owns any land there, she will, of course, still own and retain it, and her right and title will be held as sacred as those of any other owners of the soil. There is no shire town within this district, and, of course, I presume no public buildings belonging to the State. If there are, they will still be her property, though not appropriated to the same uses. There will be nothing, therefore, which she can retain the possession of, which she will be required to relinquish. Jurisdiction over the district it will be out of her power any longer to exercise, for that will be extinguished, *ispo facto*, by the decree. What jurisdiction, after the decree, can she exercise? She cannot number the inhabitants of this district

as a part of her population or her militia, for they will not be so any more than the inhabitants of the county of Providence. And no more can she tax them or their lands, or other property, for they will not be subject to her laws. The tax-gatherers can collect no taxes; her ministerial officers execute no processes within that district, for it will be out of the jurisdiction of their State; and should they attempt to do so, they will carry no Massachusetts authority with them over the boundary line established by the decree of this Court; they will be trespassers, and subject themselves to the penalties provided for the punishment of trespassers. With as much right might Massachusetts send her officers into any other part of the State as into this. She might send them into the city of Providence, or down the bay into Newport; but the civil authorities of Rhode-Island would have no difficulty in dealing with such offenders. They would be violators of the laws of the land, not only of the laws of Rhode-Island, but of the Constitution of the United States, and of the acts of Congress, under the authority of which the decree of this Court had been made, and they could not escape conviction and punishment; and any countenance Massachusetts might give them would but aggravate the offence and the punishment. No aid from this Court would be needed. The existing laws would furnish a perfect remedy for the wrongs attempted to be done. Those Massachusetts officers, sheriffs, tax-gatherers, or whatever

they might be, would have no lawful authority to demand aid from the people of the adjoining counties in Massachusetts; nor is it probable that any of those people (not being bound to obey such demand) would have any concern in violating the rights of another State, established by a decree of this Court. But should those officers, on any occasion, carry with them a sufficient body of men from Massachusetts to enable them, for the time, to seize upon the property or persons of any of the inhabitants of the State of Rhode-Island, of which this district would then be a part, and to escape into Massachusetts before they could be arrested, they would all be criminals, and punishable as such. And by the second section of the fourth article of the Constitution of the United States, and the act of Congress passed in conformity thereto, the executive authority of the State of Massachusetts, on demand of the executive authority of the State of Rhode-Island, would be bound and compelled to deliver up those criminals, to be removed for trial to the State having jurisdiction of the crime. And here, again, Rhode-Island would have a perfect remedy without the interposition of this Court. Nor would Massachusetts have it in her power effectually to obstruct the magistrates and civil officers of Rhode-Island in the execution of their official functions. Those magistrates and officers, in the performance of their lawful duties within the jurisdiction and under the authority of their own State, would have nothing

to apprehend from any quarter. Should any of them be lawlessly seized and forcibly carried within the jurisdiction of Massachusetts, still they would have nothing to apprehend. The decree of this Court, the laws of the State in which they acted, and the Constitution of the United States itself, would sustain and save them harmless. These authorities the respectable judicial tribunals of Massachusetts would not set at defiance; and if they should, their judgments and proceedings would speedily be revised and corrected here.

Thus, Sir, we find that it would be wholly out of the power of Massachusetts to prevent a final decree of this Court from taking full effect, by its own force and operation. But it is always the case that where there is least power to do harm, there is most boasting and threatening. Yet, I could not help being astonished to hear the Attorney General of Massachusetts so solemnly and portentously warning this Court of consequences, and expressing his anxious hopes that if it should decide against Massachusetts, it will, for the honor of the Court and for the honor of the country, be sure to find some way to execute its decree. What does Massachusetts threaten? Is Massachusetts ready to become a nullifying State, and to set up her own will in defiance of the decrees of this Court, and of the Constitution itself? This Court will not make a decree against Massachusetts, unless it shall be satisfied that the Constitution authorizes it, and that equity requires it. And

for Massachusetts, herself a party, to expect to prevent the Court from making such a decree as it shall deem to be constitutional and equitable, by telling the Court how formidable she is, and how contumacious and lawless she means to be, in defiance of its decrees,—in this, I think, there is almost as little policy as modesty. But let Massachusetts pursue her own course, and, whatever it may be, it will excite no apprehensions in Rhode-Island, although she will regret that so noble a State should conduct in such a manner as to tarnish her high and well-merited renown.

If, Sir, the principles and positions I have endeavored to establish are sound, and have been established, I must think that they reach and dispose of all the material objections which the counsel of Massachusetts has raised against the jurisdiction of this Court.

There were a great number of other objections, or suggestions, and statements made by the counsel, some of which I will now just advert to, although I do not consider them as having any bearing upon the question before the Court.

It is alleged that the five thousand inhabitants of the district in question (I know not how many there are) have a right to be parties to the suit, but are not. If this was so, it would be no objection to the jurisdiction of the Court. The Court would take care that they should be made parties before it proceeded further. But all the proper parties to the suit are in Court. This controversy

is about State jurisdiction, not titles to soil and freehold. I suspect, however, that if those inhabitants were consulted, they would not consent to be made defendants, but would rather join the complainant State. They are taxed hard in Massachusetts, and would have no State taxes to pay in Rhode-Island. And, at one time, a very large number of the respectable inhabitants of that district petitioned the Legislature of the State of Rhode-Island to be received into this jurisdiction, to which they claimed rightfully to belong. It is objected, also, first, that the bill contains matter in bar to itself; second, that the bill admits that Rhode-Island was never in possession, and that the suit is barred by prescription; and, third, that the controversy has been settled. These might be proper matters for discussion and proof (they are not proved yet, and cannot be, for not one of them is true) upon the trial of the cause, but evidently have nothing to do with the question of jurisdiction. Because it appeared that the Massachusetts charter of 1628, upon a scire facias from the Court of King's Bench, was revoked and annulled by that Court in 1685, and that she did not get a new charter until 1691; her Attorney General has alleged that Rhode-Island, while a colony, abandoned and surrendered up her charter. This is a great mistake. Connecticut and Rhode-Island never did surrender their charters, although they were demanded, and great efforts made to obtain possession of them. The Connecticut charter was

hidden in the hollow of the venerable old oak tree at Hartford, and that of Rhode-Island was also preserved from its enemies. The counsel (in sport, I suppose) has indulged his fancy in describing Rhode-Island as she would have been, had the claims upon her territory, formerly set up by Plymouth on the east, and Connecticut on the west, been successful. Very true. Rhode-Island would have been stripped indeed; especially with Massachusetts helping herself to five miles more of her territory on the north, which, I suppose, the Attorney General of Massachusetts thinks was quite venal while the Rhode-Island territory was looked upon as free plunder. But those claims upon the territory of Rhode-Island, on the east and west, were found and decided to be unjust. And it was Massachusetts herself, not Plymouth, which got possession of the county and towns within the limits of Rhode-Island, as before mentioned, from which, after a faint struggle, she was compelled to retreat. There is no probability that a small State will make unreasonable claims, much less encroach, upon a large one.

The counsel has asked the Court to consider the character of the colonial charters, and has read passages from Bancroft's History to show how loose and defective those charters were, and how difficult it would now be to decide controversies growing out of them.

That a case will be a difficult one to settle, is not a good reason to offer for the Court not to take

cognizance of it. But, in the present case, no difficulty can arise from such a source. The charters of both Massachusetts and Rhode Island are clear and intelligible in this particular. Rhode-Island is bounded on the north by the south line of Massachusetts, and the south line of Massachusetts was to be three miles south of the most southerly part of Charles river. The sole question, therefore, is a question of construction of that part in the Massachusetts charter. One set of the Massachusetts commissioners appointed to settle this line correctly, reported to their Legislature the construction which each State relied upon. The Rhode-Island construction was, that the point to start from was the most southerly part of Charles river proper, Charles river itself; that is, what was called by the name of "Charles river." On the other hand, Massachusetts insisted that the most southerly part of Charles river was to be found at the source of the longest stream of water running from the south, and finding its way into Charles river. And, accordingly, they found a brook called "Mill brook," which run from the south into Charles river. This they traced up to a pond called "Whiting's pond," out of which the brook run. Then, going to the south end of the pond, they found another brook, called "Jack's pasture-brook," which they traced up south to its springhead, and this they called the most southerly part of Charles river. Surely, there can be no difficulty in deciding, by the charter, which of

these constructions is the true one. These are the merits of the case, and I am sensible that they have no bearing upon the merits of the question before the Court. But the counsel of Massachusetts has repeatedly introduced the merits, and I presume it is not improper for me to follow him so far as to state them correctly. Surely, there can be no difficulty in deciding which of these constructions is the correct one. Precisely the same question was decided, more than an hundred years ago, in the controversy between Massachusetts and New Hampshire. The northern boundary of Massachusetts is defined and limited in her charter in the same manner as her southern boundary. She was to have three miles north of the most northerly part of the Merrimac river. Upon this she set up the same claim upon New Hampshire as she now does upon Rhode-Island; and, by her construction, she would have taken the whole of New Hampshire and the greater part of the Province, now State, of Maine. But her pretensions were decided to be wholly unfounded, and she was obliged to confine herself within her charter limits. Massachusetts, also, had precisely the same controversy with the State of Connecticut about the westerly part of this same line. That State and Rhode-Island, by their charters, (granted at or near the same time, 1662–3,) being both bounded northerly upon the same straight line, to be drawn due east and west, throughout. But Connecticut would not submit to the encroachments of Massa-

chusetts. And although she had entered into a written agreement with Massachusetts, establishing the line as it then was, and that agreement had been formally ratified and confirmed by the Legislatures of both States, (which never was the case with us,) yet Connecticut proved that misrepresentations and impositions had been practised upon her commissioners and Government in the running of that line, and she brought Massachusetts to a sense of justice, and obtained from her a large part, if not the whole, of the territory which the latter State had wrongfully taken within her limits. And now, Sir, whenever you look upon any map including the three States, or that part of them, you see the Connecticut north line miles in advance of that of Rhode-Island, which ought to be a continuation of it. The Government of Massachusetts has not caused, and cannot cause, any survey or map of that fine State to be taken or published, without recording anew and emblazoning her unjust encroachments upon Rhode-Island.

A singular appeal has been made to your Honors, in the gentle tones of persuasion, by the counsel of Massachusetts. They remind the Court that courts of equity do not countenance family quarrels, in the agitation of which the honor and feelings of families may be exposed to inquiry. Very well. And here is the important State of Massachusetts, surrounded by six other States, all of which show her great respect and deference;

concede to her all her reasonable demands upon them, and manifest a desire to continue in strict harmony with her. But Massachusetts is not satisfied with this. She encroaches and encroaches upon her neighboring sister States until their patience is exhausted; and, after long forbearance, they are compelled, one after another, to make their complaints of her aggressions, and seek redress. And behold, thus called upon, here comes Massachusetts, quite undisturbed, and, to smooth matters over, talks about family quarrels and family honor, and the relations between neighboring sister States, which make it improper to listen to their indiscreet complaints against one another. And so she advises that the complainants be reprimanded, and sent home. But this did not answer before the old tribunal of the King in Council, nor before the American Court of Appeals. Rhode-Island, the last of the complaining States, her grievances alone having been unredressed, entertains a high respect for her elder sister Massachusetts. But I take it upon myself, Sir, to assure you, that should this honorable Court think itself bound, in justice, to make a final decree in her favor, she will not be offended nor complain of it, although, unfortunately, the decree must be against that respected elder State.

Allow me, Sir, to conclude my remarks more seriously, and with matter more important.

The counsel of Massachusetts have talked much of the proper division of powers between the three

great departments of Government, the legislative, executive, and judicial. And they insist that the judicial is not the proper department to have cognizance of these controversies. Pray, Sir, have you heard them point out which of the other departments is the proper and appropriate one? Or what other tribunal there is to exercise this jurisdiction? The idea of entrusting the Executive with jurisdiction over controversies of any kind, whether political or civil, between States or individuals, has never entered into the head of any man. And is it not evident, that a jurisdiction over such controversies cannot consistently be exercised by the legislative department of any well balanced government? And when the structure of the Federal and State Governments relatively to each other, the adjustment, partition, and limitation of their respective powers is considered, the incompatibility of such a legislative jurisdiction is still more glaring. And, therefore, the Constitution of the United States has not permitted the exercise of any such jurisdiction to either the legislative or executive department; but has expressly conferred it upon the judicial, which is free from all the objections that lie against the other two.

What does Massachusetts mean? Does she mean that, in her controversies with any of her sister States, she is not amenable to justice before any tribunal? And that there is no remedy for an injured sister State for any wrongs she may suffer at her hands?

That there shall be no wrong without a remedy is a first principle, an axiom in all free governments. Is this the country in which that great fundamental principle of right and justice is to be first abandoned!

[The closing arguments were made by Mr. Southard, on the part of Rhode-Island, and Mr. Webster, for Massachusetts.

The decision of the Court was, that *it had jurisdiction over the cause, and power to ascertain and settle the boundary line between the two States.*

After the opinion of the Court was read, a motion was made by Mr. Webster for leave to withdraw the appearance and defence which had been entered on the part of Massachusetts. This motion was predicated upon the supposition, that had not Massachusetts appeared, the Court could not have exercised jurisdiction.

A motion was also made on the part of Rhode-Island for leave to amend the original bill by annexing thereto certain further documents, copies of which were presented with the motion.

The opinion of the Court on these two motions was delivered on the 6th of March; and the following extracts from it will show how they were disposed of, and what is the present situation of the case.]

Extracts from the Opinion of the Court.

"A motion has been made on the part of the State of Massachusetts for leave to withdraw the plea filed on the part of that State, and also to withdraw the appearance heretofore entered for the State.

"A motion has also been made on the part of Rhode-Island for leave to withdraw the general replication to the defendant's answer and plea in bar, and to amend the original bill filed in this case.

"The motion on the part of the State of Massachusetts, to withdraw the appearance heretofore entered, seems to be founded on what is supposed to have fallen from the Court at the present term, in the opinion delivered upon the question of jurisdiction in this case. It is thought that opinion is open to the inference, that jurisdiction is assumed in consequence of the defendant's having appeared in the cause. We did not mean to put the jurisdiction of the Court upon that ground." "But, as the question is now brought directly before us, it becomes necessary to dispose of it. We think, however, that the course of decisions in this Court does not leave us at liberty to consider this an open question." [The Court then review the previous decisions upon this subject, and conclude as follows:]

"So that the practice seems to be well settled, that, in suits against a State, if the State shall

refuse or neglect to appear, upon due service of process, no coercive measures will be taken to compel appearance, but the complainant, or plaintiff, will be allowed to proceed *ex parte*. If, upon this view of the case, the counsel for the State of Massachusetts shall elect to withdraw the appearance heretofore entered, leave will accordingly be given, and the State of Rhode-Island may proceed *ex parte*. And if the appearance is not withdrawn, as no testimony has been taken, we shall allow the parties to withdraw, or amend the pleadings, under such orders as the Court shall hereafter make."